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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 839

HORSMAN DOLLS, INC.,
Prosecutor-Appellant,

vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION,
Defendant-Respondent

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Appellant contends that the basis upon which the Supreme Court of the United States has jurisdiction to review on appeal the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 344 (a), pp. 205, 206 (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

and in Title 28 U. S. Code, Sections 861 (a) and 861 (b) (Act of January 31, 1928, c. 14, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466):

"861 (a). Writ of error abolished substitution of appeal. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"861 (b). Statutes governing writs of error to apply to appeals. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861A of this title substitutes for a writ of error."

2. The statute of the State of New Jersey, the validity of which is involved, is Chapter 270 of the laws of 1936 of the State of New Jersey, approved December 22, 1936, as amended by Chapter 247 of the laws of 1940 of the State of New Jersey, approved December 23, 1940, which statute is commonly known as the State of New Jersey Unemploy-

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ment Compensation Act; and more particularly that certain administrative Order purporting to be made under the said statute by the New Jersey Unemployment Compensation Commission, which is the highest administrative body under the Act, which Order is now in these proceedings as the Order of Removal of July 14, 1944, made by the State of New Jersey Unemployment Compensation Commission. For the purposes of review by the Supreme Court, under the statute, a State statute includes not only enactments of the Legislature but also administrative orders purporting to be made under State statutes. It will be helpful to insert here Section 10-B of the State of New Jersey Unemployment Act to which frequent reference is made hereinafter.

"(b) Executive director—The commission shall appoint an executive director who shall be the chief executive and approval officer of the commission and its official agent for all purposes and who shall hold office at its pleasure. He shall give his full time to the duties of this office, shall be paid a suitable salary to be fixed by the commission and shall have general charge and supervision of the work of all departments of the commission as well as any subdivisions thereof.

It shall be the duty of the executive director to administer this chapter with the advice of the commission; and to that end, the executive director shall have the following duties and powers;

(1) To formulate necessary rules and regulations, subject to approval by the commission.

(2) To appoint and fix the compensation of members of the staff, subject to approval by the commission; such appointments shall be made subject to the provisions of title II, Civil Service, at such compensation as may be fixed by the New Jersey Civil Service Commission.

(3) To make such expenditures as are necessary in the discharge of his functions hereunder as provided

for in the budget to be approved annually by the commission, to make requisitions for any funds provided by the Federal government for administration of this chapter, and he is hereby authorized to draw vouchers on the administration fund for the purpose of administering this chapter.

(4) To draw vouchers upon the unemployment compensation fund and the appropriate accounts therein for the payment of benefits.

(5) To delegate to other persons any of the powers conferred upon him by this chapter, so far as is reasonably necessary."

Live Oak Water Users Association v. *Railroad Commission,* 269 U. S. 354; *Sultan Railroad & Timber Co.* v. *Department of Labor and Industries,* 277 U. S. 135; *Compare Ex Parte Williams,* 277 U. S. 267; *Hamilton* v. *University of California,* 293 U. S. 245; rehearing denied in 293 U. S. 633.

3. The decision of the Court of Errors and Appeals of the State of New Jersey was rendered on January 31, 1946. On May 13, 1946, the judgment on said decision, which is here sought to be reviewed, was entered as of January 31, 1946. The date upon which the application for this appeal was presented was August 8, 1946.

(References hereinafter made to the record refer to the record as filed with the Court of Errors and Appeals of New Jersey.)

4. The prosecutor, Horsman Dolls, Inc., is an employer unit registered with the Unemployment Compensation Commission of New Jersey. On the basis of the payrolls of Horsman Dolls, Inc., the Unemployment Compensation Commission established a contribution rate or tax rate for that company for the calendar year 1942. The company

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promptly protested the rate and on March 9, 1943, it filed a Petition for Hearing on printed forms supplied to it by the Commission for that purpose (S. C., p. 38). No objection was made by the company to the form of hearing provided by the Commission. If successful in its protest, Horsman Dolls, Inc., was entitled to receive a refund from the Commission as well as a new contribution or tax rate.

5. The Commission referred the company's petition to its Referee who had been appointed by the Executive Director of the Commission, pursuant to Section 10b of the Unemployment Compensation Law R. S. 43:21-10. The Referee gave notice of a hearing before him for April 15, 1943 (S. C., p. 39). The notice of hearing was accompanied by instructions as to the method of procedure used at these hearings (S. C., p. 41).

The issues, briefly were as follows:

(a) Was the tax rate established by the Commission for Horsman Dolls, Inc., an illegal tax rate?

(b) Were the deductions made by the Commission from the company's account illegal deductions?

(c) Did the Commission violate the mandate of the statute in establishing the tax rate?

(d) Did the Commission violate the requirements of Due Process in establishing the tax rate?

6. These issues raised by the company in its petition were duly tried before the Referee. The Commission, as the respondent to the petition, appeared by its counsel, cross-examined the witnesses of the company, and at the conclusion of the company's case the Commission presented its defense and examined its own witnesses (S. C. pp. 29, 30). The Commission, in all respects, defended on the merits the

contribution rate which it had fixed for Horsman Dolls, Inc. (Testimony of Referee S. C. pp. 105-118). The hearings were finally concluded before the Referee and both sides agreed to submit briefs to the Referee (S. C. p. 30). Counsel for the company submitted his brief. Counsel for the Commission, after some delay, advised that it would submit no brief and would request the Referee "that a decision be made upon the record as it appears before him" (Letter of Charles A. Malloy, Chief Counsel, to Samuel Kaufman, S. C. p. 45).

7. On January 21, 1944, the Referee wrote to counsel for the company that, "My decision in the above matter will be in your hands within the next few days" (S. C. p. 48).

No decision was filed by the Referee, however, and on July 14, 1944, the Commission made an order removing the case from the Referee to itself "for further hearing and determination" (S. C. pp. 19, 51), (Letter of Commission) p. 277 (minutes of Commission).

Upon the filing of an affidavit reciting the foregoing facts, the Writ of Certiorari issued, with leave to take Depositions. Upon the basis of the Depositions so taken, and the arguments of counsel, the New Jersey Supreme Court set aside the Commission's order of removal (S. C., pp. 299-301).

8. The validity of the Order of Removal of July 14, 1944, was challenged at the outset in the New Jersey Supreme Court by the Appellant, on the ground that it was repugnant to the 14th Amendment to the United States Constitution in that it deprived Appellant of its property without notice and an opportunity to be heard before a fair and impartial tribunal, and thus without due process of law. This contention appears repeatedly in the reasons for reversal filed at the outset of the Certiorari proceedings in the New Jersey Supreme Court (S. C. pp. 20, 26). The Commission promptly took an appeal from the

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New Jersey Supreme Court to the New Jersey Court of Errors and Appeals and then the decision of the New Jersey Supreme Court was reversed in spite of the argument by counsel for the Appellant that the Order of July 14, 1944, was directly repugnant to the 14th amendment of the United States Constitution in that it deprives the Company of its property without due process of law.

9. The depositions taken in this matter are startling in their disclosures. They reveal a shocking chain of events and bring to light an unparalleled abuse of the administrative process.

Appellant called as a witness, William C. Nowels, the Referee to whom the Commission had referred the matter of Horsman Dolls, Inc., for hearing and determination. His testimony was uncontradicted except for minor irrelevant details.

10. The Referee, a member of the Bar of New Jersey (S. C. p. 62), was appointed to his position in March, 1941 pursuant to Section 10b of the Unemployment Compensation Law, R. S. 43: 21-10 (S. C., p. 7—3rd full paragraph, S. C., p. 117). The Acting Executive Director and the Commission were unanimous in their praise of the Referee as an able, efficient and conscientious tribunal (S. C. pp. 151, 207) for the three and a half years he so officiated (S. C., pp. 249-250). During that time he did no other work for the Commission except as Referee hearing cases referred to him by the Commission (S. C. pp. 89-90). Upon his appointment, the Referee was instructed to decide the cases before him as he saw them, in accordance with his judgment of the law and the facts (S. C. p. 64). After his appointment, he heard and decided approximately seven hundred cases (S. C., p. 64). As with other tribunals, his decisions were accepted, appealed, affirmed, reversed or modified in the normal course (S. C., p. 207).

11. The *Horsman Dolls* case did not, however, take that normal course. The hearings before the Referee were concluded on November 1, 1943 (S. C. p. 65). Counsel for petitioner was given seven days to file his brief and counsel for the Commission received seven days to answer (S. C. p. 30). There was a delay by the Commission's official stenographer in transcribing the record, and petitioner's brief was not filed until November 18 (S. C., p. 31) which was within time and within seven days after receipt of the transcribed testimony (S. C., p. 71).

12. In the meantime, a very strange thing occurred. About a week or ten days after the hearings were concluded and before Petitioner's brief was filed (i. e., about November 8-10, 1943) (S. C., pp. 70-71), a conference was held in the Trenton office of Frank T. Judge, Acting Executive Director of the Commission. Present, were Mr. Judge, the Referee, the Chief Counsel to the Commission and his legal assistant (S. C., p. 70). Counsel for the Petitioner was not present and the meeting was held without his knowledge (S. C. p. 73). Mr. Judge summoned the Referee to the conference (Testimony of the Referee, S. C., p. 71, Testimony of Mr. Judge, S. C., p. 144).

The Referee was first asked to decide the case in the absence of Petitioner's brief (S. C., p. 71). He was asked to "dismiss the proceedings, or deny the petition, or whatever it might have been, because of the failure to file a brief in time" (S. C., p. 73). The Referee rejected this request and pointed out that Petitioner's brief was not out of time because the transcript of testimony had not been made available as yet by the Commission to counsel (S. C., p. 71). The Referee testified:

> "I then advanced the thought or statement that the brief was not out of time and since the transcript was

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not available that could not be decided right away" (S. C., p. 73, cf. Testimony of Mr. Judge, pp. 144-146).

13. The conference continued, however, and the issues and merits of the *Horsman Dolls, Inc.*, case were thoroughly discussed (S. C., p. 73). Mr. Judge and both counsel for the Commission argued the merits against the Horsman Dolls Company and sought to persuade the Referee to find against the company and in favor of the Commission (S. C., p. 73). The Referee replied that on the merits of the case as he remembered the testimony he intended to decide in favor of the company and refused to capitulate to the persuasion (S. C. p. 73).

Finally, as the Referee testified:

> "this conference in November was left—we left the matter with the understanding that I was to review the briefs submitted by counsel and then either advise Mr. Malloy or Mr. Judge of my decision after I had an opportunity to review the testimony and the briefs and whatever law I might want to look up myself" (S. C., p. 74).

It need not be emphasized that the officials of the Commission had no right to exact this pledge from the Referee.

14. Shortly after this conference and on November 18, 1943, within time, the company filed its brief with the Referee and sent a copy to the Chief Counsel for the Commission (S. C., p. 31). The rest of November and December went by without a brief from the Commission, although petitioner's counsel wrote three times asking for it (S. C. pp. 31, 42, 43, 44), and counsel for the Commission promised to send it (S. C., p. 43). Finally on January 3, 1944, counsel for the Commission wrote petitioner's counsel that the Commission would file no brief and that the Referee would be so advised, and would be requested to

make a decision "upon the record as it appears before him" (S. C. p. 45).

15. Startling as it may appear, however, the depositions revealed that the Commission did in fact present a brief to the Referee. Sometime after the company's brief was filed (S. C., p. 66), counsel for the Commission gave the Referee a short brief with the request that he should "peruse it and return it." The Referee read it and returned it (S. C., pp. 65, 66). During the taking of the Depositions, counsel for the Commission recalled that its brief was given to the Referee "either in the latter part of November or the beginning of December." (See form of questions on cross-examination of Referee, S. C., p. 96, question No. 2.)

On further cross-examination the Referee testified as follows:

> "Q. Isn't it a fact that it was not read by you or considered by you as a memorandum of Law? A. I considered it as a brief on an argument submitted by Chief Counsel's office in their behalf in the Horsman Dolls case.
>
> Q. Although according to your recollection it only gave a summary of the facts as they appeared in the testimony? A. Well, as I said before, I don't remember the contents very clearly; but I still considered it as a brief; and, in fact, the very words used by yourself when you submitted it to me were, 'Here is my brief and I want you to return it to me as soon as you have considered it' " (S. C., p. 97).

Neither counsel for the Commission, nor his assistant, although present, took the stand to deny this testimony.

16. No copy of this brief submitted by the Commission's counsel was ever furnished to counsel for the company. In spite of these facts contained in the record, the brief on appeal now filed by counsel for the Commission contains

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the assertion that: "The attorneys for the Commission, in accordance with the well settled practice (S. C., p. 233, ll. 20-31) did not submit a brief" (brief of appellant, bottom p. 3). Such a statement, at this time, in the light of the uncontradicated testimony, is incomprehensible.

Having been advised that the Commission would submit no brief, counsel for the company wrote to the Referee twice during January, 1944, asking for the decision (S. C. pp. 31, 46, 47, 68, 69). Finally, on January 21, the Referee wrote to counsel for the company that, "My decision in the above matter will be in your hands within the next few days" (S. C. pp. 48, 69).

The Referee's prediction did not come true. He actually made a decision "within the next few days" in favor of the company. He prepared a rough draft of his opinion and eventually put the rough draft in final form (S. C. p. 69). But from January, 1944, until after the decision of the court below, he was prevented by the Commission and its representatives from filing that decision.

17. At the end of January or early in February, a second conference was arranged by Mr. Judge, the Acting Executive Director, which lasted for over an hour (S. C. p. 78) in his office (Testimony of Referee, pp. 74-78, Testimony of Mr. Judge, pp. 149-153). Present were Mr. Judge, the Referee, the Chief Counsel of the Commission and his assistant (S. C. pp. 74, 149). Neither counsel nor anyone else on behalf of the Horsman Dolls Company was present, nor did they know of the conference (S. C. pp. 77, 120).

The Referee informed all present that he had reached a conclusion adverse to the Commission and "that I was going to write my decision or that I had written it" (S. C. p. 74, cf. Testimony of Mr. Judge, pp. 149, 150). The merits of the case were then thoroughly discussed (S. C. pp. 75, 158), and as the Referee says, "they (Mr.

Judge and Mr. Ringle) could not seem to understand why I could not find in favor of the agency" (S. C. p. 75).

18. In addition to legal arguments, "other" forms of persuasion were tried out on the Referee at this conference. He was reminded that he was an employee of the Commission (S. C., p. 75). As a matter of fact, the Referee was dependent on this job for his livelihood (S. C. p. 88). He testified as follows:

> "Q. Was any suggestion made that you were an employee of the Commission and you should be loyal to the agency? A. Well, there was a lot of talk along those lines" (S. C. p. 75).
>
> • • • • • • •
>
> A. Mr. Judge, if I recall correctly, made a statement that he could not understand why I as an employee of the Commission could not find in favor of the Commission after I had heard the argument presented by Mr. Ringle. He felt there was sufficient ground for me to find in favor of the Commission.
>
> Q. What did you tell him? A. I told him as long as I had to sign the decision and it was my decision I would make the decision. I could not find sufficient grounds, as far as I was concerned; it was my best judgment that the employer, the Horsman Dolls, was correct, and I was going to make that decision" (S. C. p. 77).
>
> • • • • • • •
>
> "Q. What did you understand by Mr. Judge's remarks that the Commission would not understand why you, an employee of the Commission, could not find in their favor? A. Just what I said.
>
> Q. Were you drawing any inference from that remark? A. That they wouldn't like it.
>
> Q. Did you feel that might react against you? A. I didn't know" (S. C. p. 122).

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Bearing out this testimony of the Referee, Mr. Judge testified as follows:

> "Bill, I am not a lawyer, but as I listen to this discussion here I would not have an awful lot of difficulty in handing in a decision that would reflect the views that were expressed here by Mr. Ringle and Mr. Malloy. However, you are the Referee; this is your job. I would never do anything myself that would stultify my conscience, and I certainly would not want you to do anything that would stultify yours" (S. C. p. 150).

The Referee refused to be "convinced" by all of this persuasion (S. C. p. 77). The conference ended when he was finally told that the case would be removed from his hands and taken over by the Commission itself (S. C. p. 78).

19. Shortly after this conference, however, Mr. Judge changed his mind. He called the Referee in and told him that he "could go ahead and decide the case" (S. C. p. 78). This permission was coupled, however, with suggestions such as,

> "He asked me to try to look at it in a favorable light in so far as the Commission was concerned" (S. C. pp. 78, 79).
>
> "Well, he advanced the thought that I would try to decide it in favor of the Commission if I could" (S. C. p. 79).

Mr. Judge did not recall the last conversation with the Referee (S. C. p. 153), but seemed to remember it all as a part of the main conference in January. In fact Mr. Judge tells us that the January conference was quite successful for the Commission.

Thus he testified:

> Q. Now, how did the conference end? A. Well, Mr. Nowells got up and said, "Well, I feel much better now.

I think I can write a decision embracing these views expressed here today".

Q. You mean that he said that he was going to write a decision adopting the viewpoint of Mr. Malloy and Mr. Ringle? A. That was my understanding. I further recall that as he left the room he said, "I will get together with Herman upstairs on this. ("Herman" is identified as Herman Ringle, legal assistant to Mr. Malloy, Chief Counsel of the Commission.)

Q. Was that for the purpose of having Mr. Ringle—Herman—help him in formulating the decision? A. I don't know what the purpose was.

Q. Then he left the conference, and you understood that Messrs. Malloy and Ringle had succeeded in convincing him to decide the case their way, is that right? A. I got the impression when he left the conference, from his remark, that he felt he could write a decision embracing the views expressed by Mr. Malloy and Mr. Ringle" (S. C. pp. 152-153).

No wonder that Mr. Judge told the Referee "that he could go ahead and decide the case!" If Mr. Judge's testimony is true, it would appear that he and his associates had succeeded in their attempt to corrupt the Referee. The Referee, however, testified otherwise. He struggled with the matter. He reviewed the testimony and the company's brief again; he did some independent legal research, but could not bring himself to do what had been asked of him. He described it as follows:

"I put the case away for about a month, as I recall it, so as to approach it cold, and I took the testimony and I read it, and I read the brief, did some research of law myself and I came to the same conclusion. I also tried to write a decision in favor of the Commission if I could, but I couldn't. I drew one, but it didn't sound right to me and I destroyed it" (S. C. p. 79).

20. During the cross-examination of the Referee by counsel for the Commission, a most remarkable document came

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to light. The Referee testified that counsel for the Commission wrote and submitted to him a form of decision which could be used in the *Horsman Dolls* case (S. C. pp. 113, 114). The testimony is as follows:

> "The Witness: That isn't the only thing you submitted to me, either. You submitted a form of decision for me to write, too.
>
> Q. May I see it? A. Yes. (Producing paper.)
>
> Q. Now, you have just stated that I submitted to you a form of decision which could be written, is that right? A. That is right.
>
> Q. When did that take place? A. Frankly, I don't know. I don't know the exact date, but I would say it took place some time after January—I am not sure—the dates are not clear in my mind. I had no reason to try to fix these things in my mind.
>
> Q. Under what circumstances was the form of decision you refer to submitted to you? A. Well, you pressed your argument that a decision could be written in favor of the employer—in favor of the Commission. I said to you 'Well, if you think a decision can be written in favor of the Commission you submit one and I will look it over'. And you did" (S. C. pp. 113, 114).

This "decision", written and submitted by counsel for the Commission, was put into evidence as Exhibit P-6 by counsel for the company (S. C. pp. 119, 120).

21. In this manner the months went by from January until June. Counsel for the company, ignorant of these conferences, was at a loss to understand the delay and went so far as to complain to a member of the Commission that he was "being pushed around a little bit" (S. C. bottom p. 194), and that he "was a little unhappy about it" (S. C. top p. 195).

In the hallways and offices of the Commission in Trenton the *Horsman Dolls* case was being discussed as *The* case

before the Commission (S. C. pp. 91, 154). It was considered a matter of great importance to the Commission (S. C. pp. 108, 121); it was common knowledge that hundreds of other cases depended on it (S. C. pp. 108, 121, 154, 155); it involved millions of dollars and might result in an investigation of the agency (S. C. pp. 108, 109, 121, 122).

The Referee in the meantime could not bring himself conscientiously to decide against the company. He had already written a rough draft of his decision in favor of the company (S. C. p. 69). This was received in evidence as Exhibit P-1 for the Prosecutor (S. C. p. 81) and appears at S. C. page 253. Finally in May or June (S. C. pp. 132, 133) the Referee put his decision into final form on decision-forms furnished to him by the Commission (S. C. p. 81). This decision in final form was received in evidence as Exhibit P-2 for the Prosecutor (S. C. p. 82) and appears at S. C. page 254.

22. Then in June things began to happen again. The Referee (fully corroborated by Mr. Judge) tells it this way:

> "Well, on June 22nd—I remember the date because it is my birthday—I met him (Mr. Judge) on the train and I told him that I was going to send out the Horsman Dolls decision. I told him it had been drawn finally, it had been signed, I was going to send it out; and I told him I had come to the conclusion that the Horsman Dolls employer was correct, and that was my decision.
>
> Q. What did he do? A. He asked me to hold it up.
>
> Q. Did he ask you on the train? A. He asked me on the train, and he also sent me a memorandum to that effect.
>
> Q. What? A. He also sent me a memorandum to that effect.
>
> Q. Have you that memorandum? A. I have" (S. C. p. 80, cf. Testimony of Mr. Judge, S. C. pp. 158, 159).

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This memorandum was received in evidence as Exhibit P-3 for the Prosecutor (S. C. pp. 82, 83), appears at S. C. pages 13, 265, and reads as follows:

> "Confirming our conversation on the train this morning, don't release any decision on the Horsman Dolls case until you hear further from me" (Cf. Testimony of Mr. Judge, S. C. pp. 158, 159).

23. As may be seen from this memorandum and from his own testimony, Mr. Judge was greatly disturbed by the news he received on the train on June 22 (S. C. pp. 160, 161). He had told the Referee in January to decide the case "in accordance with his own conscience and not stultify himself" (S. C. p. 158). Nevertheless, in June he ordered the Referee not to release that decision "until you hear further from me" (S. C. p. 159). He was obviously greatly disappointed that the Referee refused to decide the case in favor of the Commission. In barring the release of the decision, which he had no right to do, Mr. Judge was no longer interested in the Referee's "conscience" or "stultification".

In his own words, Mr. Judge felt in June that he "had a bounden duty to forestall any such attack" on the Unemployment Compensation fund (S. C. p. 161), and that his failure to do so would have been a dereliction of duty (S. C. pp. 160, 161). Accordingly, as soon as he reached his office on the morning of June 22, Mr. Judge called up Mr. Ernest Eger, the Chairman of the Commission, in Atlantic City (S. C. pp. 163, 203).

Mr. Judge testified that he told Mr. Eger that the Referee was about to decide the *Horsman Dolls* case against the Commission; that the memorandum to the Referee to hold up the decision (Exhibit P-3) was sent with Mr. Eger's approval (S. C. p. 163). Mr. Eger, however, says that in this conversation he was merely asked to come to Trenton

about an important matter, the *Horsman Dolls* case, and he could not recall any other discussion (S. C. pp. 203, 204). In any event, the memorandum was sent to the Referee and the decision was held up.

24. On June 27, Mr. Eger arrived in Trenton and conferred with Mr. Judge and the Chief Counsel for the Commission (S. C. pp. 163, 204). Mr. Eger was told at this conference that the Referee had been indecisive about the *Horsman Dolls* case and unable to make up his mind; that the matter was of great importance; that conferences had been held with the Referee; that the Referee had finally concluded in favor of the company (S. C. pp. 204, 205).

Mr. Eger was not told, however, that in November, 1943, and in January, 1944, the Referee had been ready to decide in favor of the company, and had been prevented from doing so. (S. C. pp. 205, 206). Thus:

> "Q. Did they tell you that the Referee came to the conference and said, 'I am inclined to find in favor of the employer'? A. No; that information I did not have" (S. C. p. 206).

This is a vital omission. It formed the basis for Mr. Eger's future action:

> "Q. Why didn't you let the Referee file his decision? A. Well, I think I have stated it before, it was because of his apparent indecision" (S. C. p. 206).

25. After some discussion at this conference of June 27, it was suggested that the Referee should be requested to write a letter asking to be relieved of the case (S. C. pp. 163, 205). All agreed to this plan and on June 30 it was presented to the Referee at a meeting in Mr. Judge's office. Present were Mr. Judge, the Referee, the Chief Counsel and his assistant (S. C. p. 83). Neither counsel for the company nor anyone else on its behalf was present (S. C. p. 83).

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At first, the issues and merits of the case were again thoroughly discussed with legal arguments made by the Chief Counsel and his assistant (S. C. pp. 83, 84). The Referee, however, reiterated his stand that the position taken by Horsman Dolls was correct (S. C. p. 84).

Then Mr. Judge told the Referee that Chairman Eger had directed "That the Referee request the Commission in writing to be relieved of the Case" (S. C. pp. 115, 116). As the Referee testified,

> "This I refused to do on the ground that it would be tantamount or would be an admission on my part that I was either incompetent or unable to decide the issues. I told him so" (S. C. p. 116).

The conference ended on this refusal and Mr. Judge promptly informed Chairman Eger of the Referee's refusal (S. C. p. 208). On the same day, June 30, Mr. Judge ordered the Referee not to release his decision until the meeting of the Commission on July 14, 1944. This order was again in the form of a letter, Exhibit P-4, and appears at S. C., pages 13, 14. It was issued pursuant to the direction of Chairman Eger (S. C. p. 208), who testified that in no other case had a similar order ever been directed to the Referee (S. C. p. 208). The Chairman of the Commission directed this order to the Referee, although he testified that

> "I don't know anything about the case at all." (S. C. p. 209).

26. Thereafter, and on July 7 (S. C. p. 210), the Referee went to Atlantic City and conferred with Chairman Eger about the *Horsman Dolls* case (S. C. pp. 86, 87). The purpose of this meeting was to explain to Chairman Eger why the Referee refused to be relieved of the case (S. C. pp. 115, 116, 210).

Finally we come to the meeting of the Commission held on July 14, 1944 (See Excerpt from official minutes of the

meeting in Return of Writ of Certiorari, S. C. pp. 15, 19). Mr. Judge brought up the *Horsman Dolls* matter (S. C. pp. 15, 183). He told the Commissioners that the Referee had already decided the case in favor of the company (S. C. pp. 17, 165, 183, 197); that the Referee would not write a letter asking to be relieved of the case (S. C. pp. 17, 184, but cf. Testimony of Mr. Homan *contra* (S. C. pp. 196, 197), and that the case was of great importance and involved thirty or forty million dollars of the Compensation fund (S. C. pp. 285, 196). Mr. Murphy then moved that the matter of *Horsman Dolls, Inc.*, be removed from the Referee to the Commission (S. C. pp. 19, 186). The motion was carried unanimously (S. C. pp. 19, 200).

Mayor Murphy testified that he knew "nothing at all about the issues" in the *Horsman Dolls* case (S. C. p. 187); that he voted for removal of the case because of his interest as a member of the Commission in trying to protect the funds of the Unemployment Compensation Commission (S. C. pp. 186, 187, 188, 189) and because he didn't want an adverse decision in the first instance (S. C. p. 189).

Mr. Homan voted for removal because of Mr. Judge's report and the Referee's "having been worried about it. I wanted him to get some sleep" (S. C. p. 200).

Mr. Eger voted for removal because the case never should have gone to the Referee in the first place (S. C. p. 212).

27. It is this order of removal made by the Commission on July 14, 1944, which was set aside by the New Jersey Supreme Court. The order was a gross abuse of the administrative process; an autocratic, unconstitutional act.

During the cross-examination of the Referee it was disclosed that the Commission made a similar order only once prior to the *Horsman Dolls* case. It was done in a matter involving the Passaic National Bank (S. C. pp. 131,

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138). In that case also, the Chief Counsel for the Commission differed from the Referee's contemplated decision and the Commission ordered a removal (S. C. pp. 130, 139). In that case also, the Chief Counsel for the Commission assumed the dual role of "behind the scenes" judge. The *Passaic National Bank* case was removed from the Referee on July 2, 1942, and no decision had been rendered by the Commission in that case up to the time of the depositions in August, 1944 (S. C. p. 141).

28. The statements by Mr. Judge to the Commission that the *Horsman Dolls* case involves thirty to forty million dollars were entirely erroneous. The precise figures were given by William F. Dittig, who is in charge of the employers' accounts for the Commission and is Chief of the Contributors' Service (S. C. p. 216). He testified that if all employers who had filed similar petitions, including the Prosecutor and 352 others (all other having been barred by the Statute of Limitations) were to succeed in full on every issue, the maximum refund involved might approximate three million ($3,000,000) Dollars (S. C. p. 217) out of a fund of upwards of three hundred seventy million ($370,000,000) Dollars (S. C. p. 181). The total amount of refund involved in the *Horsman Dolls* case itself is about $10,000.00 for 1942 and $10,000.00 for 1943, these being maximum figures (S. C. p. 221).

29. The subject matter of this appeal is the invalid order of the Commission of July 14, 1944, removing the matter of *Horsman Dolls, Inc.*, from the Referee to itself for further hearing and determination. (See Return to the Writ, S. C. pp. 19 and 14.) The Commission proposed by this order to substitute itself for the Referee as the tribunal in that cause.

The Commission, however, was also the only respondent in the cause. It had established a tax rate or contribution rate for the company. The company protested and filed its

petition for a hearing. At the hearing, the Commission appeared, responded and defended the rate which it had established. In all respects it submitted to the jurisdiction of the Referee on the merits and contested the position taken by the Company. A decision on the merits in favor of Horsman Dolls, Inc., means that the Commission must refund the illegal exactions. A simple statement of these facts should be enough to justify an affirmance of the judgment by the Supreme Court below setting aside the order of removal.

30. One of the basic tenets of our common law system, safeguarded also by the Constitution, is that a party in a cause, or one with an interest therein, may not sit in judgment in that cause.

The Commission itself had established the rate. It then sought to be the arbiter as to the validity and propriety of that rate, when challenged by the company. This attempt did not even feign legality. It was a mockery of our Constitutional safeguards and was in utter violation of the Due Process requirements of our Federal and State Constitutions. As pointed out by Mr. Justice Brandeis, concurring in *St. Joseph Stockyards* v. *United States,* 298 U. S. 38, 73 (1936):

> "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial, and that it shall be conducted in such a way that there will be an opportunity for a court to determine whether the applicable rules of law and procedure were observed" (at p. 73).

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This "inexorable safeguard" of due process has been demanded even in the freest and most liberal decisions of our highest court dealing with administrative tribunals. *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Morgan* v. *U. S.*, 298 U. S. 468 (1936); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Shields* v. *Utah, Idaho Central R. R. Co.*, 305 U. S. 177, 182 (1938).

31. The Horsman Dolls Company in the instant case did not ask for any special kind of hearing. It was satisfied from the outset with any fair and impartial hearing which the Commission could provide. In fact, the very Petition for Hearing filed by the Company was on forms supplied by the Commission (S. C., pp. 29, 38, 39); the cause was referred to the Referee by the Commission itself in accordance with its own established procedures (S. C., pp. 100, 102, 223, 224); the Referee was an employee of the Commission appointed by the Executive Director pursuant to the statute, R. S. 37: 21-10 (b).

With all of these things the appellant herein had no quarrel. But it did insist upon a fair and impartial hearing at some point. The Company could not receive that fair and impartial hearing and determination from the said Commission which had established the rate.

In the words of Mr. Justice Douglas,

> "The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding, so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills Inc.* v. *Administrator*, 312 U. S. 126 at page 153 (1941).

The order of removal made by the Commission on July 14, 1944, sought to deny the company any hearing at any

stage before an impartial tribunal, and was, therefore, null and void.

32. In addition to having fixed the rate itself, the Commission and its members have an interest in the Unemployment Compensation Fund. As members of the Commission they are interested in protecting, maintaining and safeguarding the fund. While they have no personal pecuniary interest in the fund, their interest in a representative and official capacity disqualified them from being the tribunal in the *Horsman Dolls* case—a matter in which the Company is seeking refunds from the Commission.

As a matter of fact, this was frankly admitted by one of the Commission members during the depositions. Mayor Murphy testified as follows:

> "Q. Now, what were your reasons for making the motion and voting in favor of removing the case from the Referee? A. My reason is from the explanation given; and when I heard what was involved in this fund, I personally have a great interest in trying to protect the funds of the Unemployment Compensation Commission set up in this state, and I feel as though I am charged with that responsibility as a member of the Commission, having worked for the passage of the law, having been on the Commission since its first inception, whether it is this case or any other case that is brought to my attention of this kind I would vote just the same to have it brought right directly into the Commission, as I feel they are the responsible head.
>
> Q. And you yourself did not read the record that had been taken before the Referee at the time you made your motion? A. I haven't seen the record to date, even up to now.
>
> Q. Did you know what the issues were in the case? A. I know nothing at all about the issues" (S. C., pp. 186, 187; see also similar statements at pp. 188, 189).

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In the celebrated case of *Tumey* v. *Ohio*, 273 U. S. 510 (1927), the United States Supreme Court disqualified a tribunal for similar cause. In that case, the Mayor of a town was sitting as a tribunal in ordinance violations. Aside from receiving small costs for every conviction, the fines he imposed went into the town treasury and enhanced its funds. This was held a violation of due process because the Mayor, in his representative and official capacity, had an interest in the protection and enhancement of the town funds. It was pointed out by Mr. Chief Justice Taft at pages 533-534:

> "With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and heavy fine? The old English cases cited above of the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. Boston *v.* Baldwin, 139 Mass. 315, 1 N. E. 417; State ex rel. Colcord *v.* Young, 31 Fla. 594, 19 L. R. A. 636, 34 Am. St. Rep. 41, 12 So. 673."
>
> (See also *Rugan* v. *Ohio*, 277 U. S. 61 (1928).)

33. The interest of the Commission and its members in the Compensation fund is more direct than the interest of the Mayor in the *Tumey* case. The Commission, in fact, is the real party in interest in the *Horsman Dolls* case because of its relation to the fund as well as the relation of the fund to the contribution rate. This has already been passed upon and established as to this Commission by the highest Court of New Jersey. In *Provident Mutual etc. Co.* v. *Unemployment Compensation Commission*, 126

N. J. L. 348 (1941), (opinion by Oliphant, J. aff. Ct. Err. & App.), the Court clearly held and explained this relationship as follows:

> "The Unemployment Compensation Commission and its director have been named as parties defendant since they are the administrative officials designated by the Unemployment Compensation law (at p. 349).
>
> • • • • • • •
>
> "Provision is made in our Unemployment Compensation law for the assessment, levy and collection of compulsory contributions by employers as defined in the act. The moneys collected are held in a separate state fund and are disbursed by the state treasurer on requisitions of the Unemployment Compensation Commission. The members of the Commission are appointed by the Governor. The contributions to the funds are not voluntary. They are compulsory and constitute a tax. The plaintiff seeks by this proceeding to have judicially determined whether certain of its agents are employees for the purpose of ascertaining its tax liability. The state then, through its alter ego, the Unemployment Compensation Commission is the real party in interest for the amount the state is entitled to collect from the plaintiff is directly involved and the judgment sought to be obtained here would operate to control the action of the state with respect to the collection of this tax" (at pp. 350, 351).

Thus we already have a clear-cut judicial determination that this Commission is the real party in interest in a case such as the matter of *Horsman Dolls, Inc.*—wherein the contribution rate is in issue and the compensation fund may be affected.

We submit therefore that under the cases cited and under basic principles, the Commission could not itself adjudge the cause.

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A copy of the opinion of the New Jersey Supreme Court, reported in 133 N. J. L. 11; 42 Atl. (2d) 777, is annexed hereto; a copy of the opinion of the New Jersey Court of Errors and Appeals reported in 134 N. J. L. 77; 45 Atl. (2d) 681, is annexed hereto.

For the foregoing reasons Appellant contends that this appeal presents a substantial Federal question for the determination of this Court.

It is respectfully submitted that there is basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause.

NATHAN BILDER,
Attorney for Appellant.

APPENDIX "A"

NEW JERSEY SUPREME COURT—JANUARY TERM, 1945

No. 210

Filed April 13, 1945

HORSMAN DOLLS, INC., Prosecutor,

vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION, et al., Defendants.

On Certiorari before Justices PARKER and COLIE

Opinion

Argued January 16, 1945: Decided April 13, 1945

"Under the 'Unemployment Compensation Law' P. L. 1936 c. 270, R.S.43:21-1 et seq. where there has been a reference to a 'salaried examiner,' sometimes called a 'referee', to determine the contribution rate, such reference is irrevocable.

For the prosecutor, Samuel Kaufman.

For the defendants, Herman D. Ringle.

The opinion of the court was delivered by

PARKER, J.:

The writ brings up for review "a certain order" rendered on July 14, 1944 by the Unemployment Compensation Commission of the State of New Jersey in relation to the matter entitled "In the Matter of Horsman Dolls, Inc., then pending before William C. Nowels, Referee of the State of New Jersey Unemployment Compensation Commission." The reasons filed are twenty-four in number but need not be reproduced at length. The history of the case shortly stated is, that the Compensation Commission, in the execution of its duties under the statute (P. L. 1936, c. 270; R. S. 43:21),

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established a contribution rate for the prosecutor corporation for 1942. Prosecutor protested the rate and applied for a hearing in the usual manner, and the commission, pursuant to its own regulations, sent the matter to a "referee". The statute does not seem to provide for a "referee" by that name, but does provide for a "salaried examiner": and the power to make such appointment is not the subject of my attack here. The question for decision seems to be whether in cases like the present one, a reference to the referee is irrevocable. We answer it in the affirmative. For the defendants, reference is made to the Commission's "Regulations and Rules relating to Referee and Commission Hearings" which contains this sentence: "The Executive Director or the Commission may remove to himself or itself for determination, any proceeding before a Referee". The question then arises, whether the statute has endowed the Commission with power to make that regulation. We answer it in the negative. If such power exists it must be derived from R. S. 43:21-6(e), a paragraph too long to be reproduced here at length, which empowers the board of review to remove itself * * * the proceedings on any claim pending before an appeal tribunal. But we think that clearly this language, and indeed the whole of paragraph 6(e) refer only to claims for benefits filed by employees and have no application to the fixation of contribution rates for employers. The order under review will therefore be set aside, but without costs, the defendant Commission being a state agency, and the individual defendants being the members of the Commission. Tenement House Board *v.* Schlechter, 83 N. J. L. 88; Rayner *v.* Benjamin, 88 Id. 83, 86; Manufacturers Land Co. *v.* Board, 98 Id. 638; Kearny *v.* State Board, 103 Id. 541.

(Opinion reported in 133 N. J. L. 11; 42 A 2 777.)

APPENDIX "B"

NEW JERSEY COURT OF ERRORS AND APPEALS—OCTOBER TERM, 1945

No. 13

HORSMAN DOLLS, INC., a corporation of New Jersey, Prosecutor-Respondent

vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION, Defendant-Appellant.

Argued Oct. 17, 1945: decided Jan. 31, 1946.

On appeal from New Jersey Supreme Court whose opinion is reported in 133 N. J. L. 11.

For the prosecutor-respondent, Alexander Budson; Bilder, Bilder & Kaufman. Samuel Kaufman, of Counsel. Bernard Hellring, On the Brief.

For the defendant-appellant, Charles A. Malloy, Herman D. Ringle, of Counsel.

The Opinion of the Court was delivered by

BROGAN, Chief Justice.

The question presented by this appeal is the validity of an order of the Unemployment Compensation Commission by which the Commission "removed to itself" an appeal of Horsman Dolls, Inc., then pending before Mr. Nowels, employed by the Commission as a legal assistant, to whom it had been referred by the Commission. As a matter of procedure, the reference comes from the office of the Chief of Contributor's service. Mr. Nowels had been designated to act in the capacity of "referee" by the Commission's Executive Director some years ago. The Supreme Court, certiorari having been allowed, vacated the order in question holding that the reference once made was irrevocable; and further that the commission had no power, under the statute which created it (R. S. 43:21-1, et seq.) to make the regula-

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tion in question (#10) which permitted it to "remove" to itself or its Executive Director "for determination, any proceeding (pending) before a referee". (133 N. J. L. 11). This, we think, was error.

The basic question involved in the appeal which had been referred to Mr. Nowels was whether Horsman Dolls, Inc., an employer, had been assigned a proper contribution rate or tax for the year 1942. The employer contended that the rate assigned it was too high; that the rate fixed had been "adversely affected" by "improper charges" made against its account. Its right to a refund of contributions paid under protest for 1942 was necessarily involved. The employer charges that the Commission relieved Mr. Nowels of the case because it had learned that he was about to determine the matter in favor of the employer.

Despite our conclusion (a) that a reference once made is not irrevocable and (b) that a subordinate in the Commission has no power of decision in the matter of tax rate, adjustment thereof, or refund to the employer, we are impelled to say that, assuming the power in a subordinate to decide a matter referred to him, any attempt to dictate what his judgment should be or to coerce him in the conscientious expression of his opinion cannot be defended. On the other hand, it is only fair to say that Mr. Nowels, in deposition, unequivocally stated that neither the Executive Director nor any member of the Commission ever directed him "to make a decision in favor of the Commission." It is clear, however, that Nowels was of the opinion that the rate of tax imposed on the employer was excessive and that he informed the Commission and its Executive Director of his view and that thereafter he was relieved of the matter.

Resuming our examination of the question in this case: Mr. Nowels was designated as "referee". There is no such office eo nomine, provided for ni the statute, supra. There is provision for a representative of the Commission as "Deputy" to be designated by the Executive Director, to examine *claims;* and he has power to decide the issue; or he may refer it to an appeal tribunal or a board

of review, etc. (Section 6-b). There is provision for a "salaried examiner" (Section 6-d) who serves in the appeal tribunal; for a board of review (Section 6-e) which, among other things, is empowered to affirm, modify or set aside the decision of the appeal tribunal and this board may remove to itself or transfer to another appeal tribunal the proceedings on any *claim* pending before an appeal tribunal, etc., but in all cases under this chapter of the statute the subject matter is that of *claims for benefits* and nothing else. This class of claim has to do only with the rights of employees, under the statute, and does not extend beyond such subject matter. In its opinion, supra, the Supreme Court recognized that the statute made no provision for a "referee by that name" and seemed to consider that "referee" and "salaried examiner" were more or less identical. We find no support for that view in the statute. The salaried examiner functions only in the matter of claims for benefits—not in the matter of contribution rate or refund. On the precise issue between the respondent and the Commission, our view is that the statute (Section 14-G) entrusts the matter of determining whether the contributions by the employer were erroneously collected and whether there should be an "adjustment" or refund exclusively to the Commission or its Executive Director. Such determination is reviewable by certiorari (Section 14-3).

The statute, supra (11th section), under the heading "Administration", contained a particularized grant of power to the Commission for the accomplishment of the aims and objects of the statute. The Commission has the duty to determine matters of policy, has rule making powers, may require reports, make investigations, etc. It may appoint such officers, accountants, attorneys, experts, etc. as may be necessary to effectuate the purposes of the statute (Section 14-d). There is provision for hearing, the swearing of witnesses, depositions, and power of subpoena, etc. (Sections 11-h and i).

It is contended by the Commission that by virtue of this grant of power under this section of the statute, the Commission has power to refer such matter to a referee

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or, as the brief describes such role, "a hearing officer" or "examiner" or "moderator"—without power of determination—as a mere compiler of a record—for the purposes of the agency, upon which it is not binding. We concur in this view, pointing out that there is no such office as "referee" mentioned; nomenclature, however, is not important. But conceding the power to appoint a "hearer" to "compile a record", there is not a vestige of authority conferred on the Commission by the statute to invest such appointee with power of decision as plainly was intended by the Commission when this matter was referred to Mr. Nowels. The Commission may make and promulgate rules within the power granted it in the statute, supra. Any power of decision invested in or exercised by such hearer, examiner or "referee" is ultra vires. With regard to a reference of a matter of this kind to a subordinate by the Commission or its Executive Director, we think the Commission or its Executive Director may have the aid of assistants in the department. In the case of Morgan *v.* U. S. 298 U. S. 468, the court (p. 481, et seq.), passing on the administrative procedure, set out in the Packers & Stockyards Act of 1921, (U. S. C. A. Title 7, Sec. 181-229), where the Secretary of Agriculture is required to make the rate order, held that the official whose duty it is to make the rate must have heard or considered the evidence and the argument of the parties; that it is a duty akin to that of a judge; "that the one who decides must hear." The opinion then says:

> "This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in substantial sense. And to give the substance of a hearing which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly

> may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred. * * *."

If the Unemployment Compensation Commission requires the aid of its subordinate in hearing or compiling a record in a matter of the kind under consideration, there is no reason why it should not have such assistance, providing procedure such as is outlined above be followed and the evidence considered and argument heard by the agency which has power of decision—in this instance the Commission or its Executive Director. A fair and open hearing required by our law will countenance nothing less.

The respondent argues that the Commission may not sit in judgment in its own cause. The reasoning proceeds that the Commission originally fixed the rate; that on the employer's appeal the Commission "appeared, responded and defended the rate"; that it "submitted to the jurisdiction of the referee on the merits." First, the referee was without power to decide and his judgment, if made would be a nullity. The exercise of such power by him collides with the statutory provision (14-f) which places the power of adjustment and refund in the Commission or the Executive Director. But conceding that the Commission made the rate and defended it before Mr. Nowels, yet this does not disqualify the Commission or its Executive Director. To be sure, counsel for the Commission wished the case decided his way. But there is no evidence that the Commission prejudged this case on grounds that were rooted in bias or discrimination. We must assume that the judgment, when made, will represent the conscientious views of the Commission or its Executive Director on the matters in controversy. Compare U. S. *v.* Morgan, 313 U. S. 409. And if the employer, after decision, is aggrieved the matter is open to judicial review. The statute so provides.

It is further argued that the Commission has an interest in the fund. It has no pecuniary personal interest. We assume that the Commissioners have the interest which as members of the Commission they are expected to have. If they are zealous in that interest, it is no disqualification. The cases cited by the respondent are not to the contrary.

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It is next argued that the Commission obstructed the decision of the referee. The answer to this is that he had no power to decide. The respondent makes other points which have been considered but found wanting in substance.

Irrevocability of reference; Nowhere in the respondent's brief do we find any argument to support the proposition that a reference of a matter to a subordinate is irrevocable. In the very nature of things under administrative procedure, the Commission is necessarily competent to withdraw a reference from a subordinate. So many reasons can arise for the exercise of such discretion that it is not necessary to do more than refer to some of them in passing. The subordinate might become ill; circumstances might disqualify him; he might not be competent in a matter, technical in character; time might become of the essence; the matter could assume an importance that would prompt the Commission, in the public interest, to hear it in all its detail; and the like.

In conclusion, we think that that part of the rule (#10) which purports to invest a hearing officer, examiner or referee with power of "determination and decision" is void. That power is non-delegable. The statute, as stated, supra, places it in the Commission as such or in its Executive Director.

The judgment of the Supreme Court is reversed.

(Opinion reported in 134 N. J. L. 77; 45 A 2 681.)